Supreme Court, U.S.
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In The
Supreme Court of the United States

ROBERT H. GOLDEN AND JUDITH A. GOLDEN,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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February 17, 2009

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QUESTION PRESENTED

Under the Rules of the Tax Court, Rule 39 and Rule 40, and the sections of the Internal Revenue Code, 26 USC 6501; 26 USC 6330, is the decision of the Tax Court and Sixth Circuit Court of Appeals violative of those Rules and contrary to those applicable sections of the Code, so as to be contrary to virtually all prior cases and Rule interpretation?

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PETITION FOR WRIT OF CERTIORARI

Robert H. Golden and Judith A. Golden respectfully petition for a Writ of Certiorari to review the Opinion and Judgment of the U.S. Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Opinion of the U. S. Court of Appeals for the Sixth Circuit, dated November 26, 2008 is officially reported at 548 F.3d 487 and is reproduced at App. A, 1a –19a.

The Memorandum Opinion No. 2007-299 of the United States Tax Court in Case No. 04-16694 dated October 1, 2007 and is reproduced at App. B, 19a-27a

The Memorandum Opinion granting Summary Judgment on the issue of the Statute of Limitations. No. 2005-170 reproduced at App. D, 30-40a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on November 26, 2008. This Petition is timely under Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the Opinion and Judgment sought to be reviewed. This Court has jurisdiction to review the judgment of the United States Court of Appeals of the Sixth Circuit pursuant to 28 U.S.C. 1254(1)

STATUTORY PROVISIONS ALLOWED

1. **Statute of limitations on assessment 26 U.S.C. 6501(a):**

   "General Rule: Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed(whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period. For purposes of this chapter (26 USCS 6501 et seq.), the term 'return' means the return required to be filed by the taxpayer(and does not include a return of any person from whom the taxpayer has received an item of income, loss, deduction, or credit)."

2. **26 U.S.C. 6501(c)(4)(A) exceptions:**

   "In general. Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title, except the estate tax provided in chapter 11(26 USCS 2001 et seq.), both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the

expiration of the period previously agreed upon."

3. **26 U.S.C. 6330(b)(1) Notice and opportunity for hearing before levy, Right to fair hearing:**

"In general. If the person requests a hearing in writing under subsection (a)(3)(B) and states the grounds for the requested hearing, such hearing shall be held by the Internal Revenue Service Office of Appeals."

26 U.S.C. 6330 (c) (2) (A): Matters considered at hearing:

In general. The person may raise at the hearing any relevant issue relating to the unpaid tax or the proposed levy, including

(i) appropriate spousal defenses

(ii) challenges to the appropriateness of collection actions; and

(iii) offers of collection alternatives, which may include the posting of a bond, the substitution of other assets, an installment agreement or an offer in compromise."

26 U.S.C. 6330 (d)(1): Proceeding after hearing:

(1) Judicial review of determination. The person may, within 30 days of a determination under this section appeal such determination to the Tax Court (and the tax court shall have jurisdiction with respect to such matter.)"

STATEMENT OF CASE

Petitioner, Robert Golden, without his wife's agreement, purchased, through William C. Roney & Company, a New York Stock Exchange Broker located in Detroit, Michigan, a limited partnership interest in a venture known as Spring Hill Associates. This investment was in the amount of $29,000. The purchase price was paid to the Roney Company in two installments over a period of about thirty days and comprised two checks, one for $20,000.00, the other for $9,000.00 .

Petitioners had no right to, could not and did not involve themselves with the management of the venture in any way and were passive investors.

Each year thereafter petitioners received K-1 schedules to be filed with their Form 1040 and, believing that the forms were proper, attached them to their federal tax returns for the years 1977, 1978, 1979, 1980 and 1981 and claimed the losses thereon. All tax returns were prepared by a certified public accountant and filed by petitioners as joint tax returns. Based upon the information known at the time of filing these returns, the returns were properly prepared as it took the Internal Revenue Service more than 10 years of detailed audits and on site inspections before they had enough information to disallow the losses set forth on the K-1s.

In the year 1981, petitioners were contacted by the Internal Revenue Service, respondent, and requested to extend the statutes of limitations while the Internal Revenue Service investigated the books and records of the partnership, Spring Hill Associates. There was no

mention of improprieties nor did the Goldens have any knowledge or hint of any wrongdoing or improper deductions or losses. Petitioners extended the statute of limitations as requested and continued to, at the request of the Internal Revenue Service, extend the statute of limitations until 1986 when the request for a further extension was received. Believing that the Internal Revenue Service had more than enough time to complete its investigation, all further requests for extensions of the statute of limitations were refused by Mr. and Mrs. Golden.

Although there were no further extensions of the limitations statute by petitioners, no assessment was made by the Internal Revenue Service until 1994. However, in spite of the fact that there was no assessment made, a levy was made upon real estate owned by the petitioners on September 26, 1988 for taxes which the Internal Revenue Service claimed were due for the year 1976 as a result of its investigation of Spring Hill Associates and the Commissioner's disallowance of certain deductions claimed by the partnership and a pro-rata portion claimed on the K-1 schedule of the petitioners for that year.

This levy for the 1976 tax deficiency was paid in 1988 by the petitioners and discharged by the Internal Revenue Service. Petitioners received a document entitled Notice of Deficiency dated June 1, 1990, and, believing that the notice was an assessment, filed a suit in the Tax Court. (Case No. 18777-90) The Court made no rulings in that case. Although the Complaint in the Tax Court raised the issue of the statute of limitations as of 1990 when the case was filed, the case was concluded by a stipulated decision of the court

entered on February 7, 1994. It was stipulated that the respondent be allowed a write-off of the $29,000 initial investment in Spring Hill Associates which had up to that point been denied. A final order was entered by the Tax Court which reduced the amounts owed and reduced the tax due for the year 1977 from $16,718.00 to $2,218.00.

On May 10, 1994 the Internal Revenue Service made an assessment for the tax years in question here. The amounts of that assessment were the same as the Notice of Deficiency received by the petitioners six years earlier except for the allowance of the initial investment write off which reduced the tax owed for one year.

This case was filed in the United States Tax Court on September 10, 2004 claiming that the three year statute of limitations, 26 U.S.C. 6501, was a bar to the assessment made by the Commissioner in 1994. In 1986 Mr. Golden and Mrs. Golden refused to further extend the statute of limitations.

The Goldens requested an administrative appeal from a Notice of Levy pursuant to 26 U.S.C. 6330 and raised in that hearing the statute of Limitations, 26 U.S.C. 6501 pursuant to the statutory section, 26 U.S.C. 6330 (c)(2)(A) which allows all relevant matters to be raised. The hearing officer denied any relief and held that the statute of limitations had not passed although there was no assessment from April 15, 1986 to 1994.

A Complaint was filed by the Goldens in the Tax Court which resulted in the Commissioner bringing a motion based on res judicata even though he had not

pled any affirmative defense and the Rules of the Tax Court provided that res judicata must be pled as an affirmative defense and could not be raised for the first time on motion. The Tax Court ignored its own rules and issued a summary judgment on the issue which prevented the Goldens from bringing up the statute of limitations at the later trial.

An appeal was taken to the Sixth Circuit Court of Appeals which ignored all prior precedent and affirmed the lower court decision.

THE BASIS OF JURISDICTION OF THE UNITED STATES TAX COURT, THE COURT OF FIRST INSTANCE

The Goldens requested an administrative appeal under 26 U.S.C. 6330. The action of the Internal Revenue Service was upheld administratively. Petitioners, within 30 days filed a Complaint in the United States Tax Court as allowed by 26 U.S.C. 6330(d)(1) which provides for jurisdiction in the United States Tax Court.

REASONS FOR GRANTING THE PETITION

The Opinion of the Sixth Circuit so confines the jurisdiction of the Internal Revenue Service Appeals Division indicating that a taxpayer due process hearing under 26 U.S.C. 6330 can not raise the statute of limitations contrary to the direct wording of 26 U.S.C. 6330(c)(2)(A). Such a ruling by the Sixth Circuit Court of Appeals will result in a substantial curtailment of the rights which Congress has conferred upon the taxpayer and will deprive consideration of the statute of limitations. Further, the rulings herein

complained of are contrary to all other circuits and even the Tax Court itself. Section 6330 specifically allows such a hearing to concern any relevant consideration raised by the taxpayer and does not restrict the Appeals Division from hearing a claim that the statute of limitations bars assessment and/or further collection action.

Rule 39 of the United States Tax Court provides that the defense of res judicata must be set forth in the responsive pleading of the party. Rule 40 of the United States Tax Court clearly sets forth that only lack of jurisdiction and failure to state a claim may be raised for the first time by motion. The Opinion of the Sixth Circuit holds that the Commissioner may raise for the first time the affirmative defense of res judicata by motion directly contrary to the Rules of the United States Tax Court. The Commissioner failed to plead any affirmative defenses and did not plead res judicata. Both the Tax Court and the Sixth Circuit Court of Appeals decided that the Commissioner could indeed raise the issue of res judicata for the first time on motion even though such a determination is contrary to the Rules of the Tax Court. Are not the Rules of Court applicable to all?

Both the Tax Court and the Sixth Circuit Court of Appeals hold that the prior mention of the statute of limitations in the 1990 Tax Court case is res judicata as to the statute of limitations. Without considering that the present claim of a bar by the statute of limitations is based on different facts than those previously brought before the court to wit: that the assessment of 1994 is barred by the limitations statute, 26 U.S.C. 6501. It would be impossible to raise the 1994 assessment being barred by the statute

of limitations in a 1990 Tax Court case. For res judicata to apply, the facts must be the same in both filings.

1. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS IGNORES COURT RULES OF THE TAX COURT AND ALL PRIOR DECISIONS OF THE VARIOUS OTHER COURTS OF APPEAL AND THE TAX COURT OF THE UNITED STATES IN AFFIRMING THE DECISION OF THE TAX COURT.

A. Res judicata is an affirmative defense which all courts require be pled in the first responsive pleading and which the Tax Court prohibits being brought up for the first time on motion. This is ignored by both the Sixth Circuit and The Tax Court.

It is textbook law that res judicata is an affirmative defense and is waived if not pled in the first responsive pleading.

Rule 39 of the Rules of the Tax Court provides that res judicata must be pled as an affirmative defense and Rule 40 provides that res judicata may not be brought up for the first time on motion :

> "A party shall set forth in the party's pleading any matter constituting an avoidance or affirmative defense, including res judicata...." Rule 39 of the U.S. Tax Court. See also: Enos vs Comm. 123 T.C. 17, 35 (2004)

> "Every defense, in law or fact, to a claim for relief in any pleading shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may, at the option of the pleader, be made on motion: (a) Lack of jurisdiction, and (b) failure to state a claim upon which relief can be granted...." Rule 40 of the U.S. Tax Court. See also: Bonaire Dev. Vs Comm., 76 T.C. 789, 802-803 (1981) aff'd 679 F2d 159. (9th Cir. 1982)

The Commissioner pled no affirmative defenses, did not plead res judicata and raised the affirmative defense of res judicata on motion all contrary to the Rules of the Tax Court. Both the Tax Court and the Sixth Circuit ignored those rules in making its decision and allowed the Commissioner to raise res judicata for the first time on motion.

B. The Sixth Circuit incorrectly held that the statute of limitations cannot be raised at a section 6330 administrative appeal and therefore, it can not be raised in the Tax Court in an appeal from the administrative hearing.

The ruling of the Sixth Circuit in holding that the Goldens could not raise the statute of limitations in this case because they could not raise the statute of limitations in the administrative appeal is contrary to statute.

> "In general. The person may raise at the hearing any relevant issue relating to the unpaid tax or the proposed levy including (i) appropriate spousal defenses, (ii) challenges to

> the appropriateness of the collection actions, and(iii) offers of collection alternatives..." 26 U.S.C. 6330 (c)(2)(A).

What is more appropriate than a claim that the statute of limitations prevents further collection action because the statute had created a bar to assessment before the assessment was made in 1994? The holding of the Sixth Circuit prevented the Goldens from having a fair appeal review.

C. Res judicata requires that the facts claimed currently must be the same facts previously claimed.

In the prior Tax Court case filed in 1990, it was the claim of the Goldens that the statute of limitations, 26 U.S.C. 6501 commenced to run with the refusal to extend the statute effective April 15, 1986, creating a bar to assessment on April 15, 1989. The claim of the Goldens in this case is that the assessment made in 1994 was barred by the statute of limitations, 26 U.S.C. 6501. Factually, the claim made in this case is a different question posed before the court and not res judicata as a result of the previous 1990 Tax Court case. Proctor and Gamble v. Amway Corp. 139 Fed Appx 147 (5th Cir. 2004); Schafer v. Indian Spring Maint, Ass'n, 139 Fed 3d 147 (11th Cir. 2005); Q Int'l Courier Inc v. Smouk, 441 F3d 214 (4th Cir. 2006); Nunes v. Ashcroft, 375 F3d 810 (9th Cir 2004). Both the Tax Court and the Sixth Circuit held that res judicata prevented the Tax Court from entertaining the claim that the 1994 assessment was barred by the statute of limitations. Such a holding is contrary to holdings made in other circuits.

CONCLUSION

The Writ of Certiorari should be granted.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 07-2431

[Filed November 26, 2008]

ROBERT H. GOLDEN and JUDITH A. GOLDEN, *Petitioners-Appellants*,	)
v.	)
COMMISSIONER OF INTERNAL REVENUE, *Respondent-Appellee.*	)

On Appeal from the United States Tax Court.
No. 04-16694.

Argued: September 16, 2008

Decided and Filed: November 26, 2008

Before: MOORE and COLE, Circuit Judges; GRAHAM, District Judge.*

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* The Honorable James L. Graham, United States District Judge for the Southern District of Ohio, sitting by designation.

COUNSEL

ARGUED: Robert H. Golden, Southfield, Michigan, for Appellants. Richard L. Parker, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Robert H. Golden, Judith A. Golden, Southfield, Michigan, for Appellants. Richard L. Parker, Teresa E. McLaughlin, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

OPINION

KAREN NELSON MOORE, Circuit Judge. Taxpayers Robert and Judith Golden appeal from two orders of the Tax Court sustaining the determination of the Internal Revenue Service ("IRS") Appeals Officer, which denied the Goldens relief from the IRS's proposed collection action. The underlying tax dispute, the merits of which are not before us, involved deductions and credits the Goldens claimed on their income-tax returns in the 1970s and early 1980s. In 1990, after the IRS issued a notice of deficiency for these tax years, the Goldens sought review in the Tax Court, and a stipulated decision was entered in 1994. The current litigation stems from the IRS's proposed levy action to collect on these deficiencies. After a collection due-process hearing, the Appeals Officer upheld the proposed levy action, and the Goldens petitioned for review in the Tax Court. The Goldens now appeal the Tax Court's grant of summary judgment to the Commissioner, which sustained the Appeals Officer's determination that the levy action was not time-barred. The Goldens' primary argument on appeal is that the Tax Court erred in finding that the Goldens were precluded by res judicata from

challenging the timeliness of the assessment. Additionally, Mrs. Golden appeals the Tax Court's decision, reached after a trial, denying her innocent-spouse relief under Internal Revenue Code ("I.R.C.") § 6015 (26 U.S.C. § 6015). For the reasons explained below, we **AFFIRM** the Tax Court's orders sustaining the determination of the IRS Appeals Officer.

I. BACKGROUND

In the mid-1970s, the Goldens invested $29,000 in a partnership called Spring Hill Associates ("SHA"). Before making the investment, Mr. Golden, who is an attorney, consulted with his wife, a former teacher with a bachelor's degree in education. Although Mrs. Golden initially expressed concern about the investment, she eventually acquiesced, and both Mr. and Mrs. Golden became limited partners in SHA. The Goldens subsequently claimed partnership losses and investment credits from the SHA investment on their joint tax returns for the tax years 1977, 1978, 1979, 1980, and 1981 and amended their 1974 return to claim an investment credit carryback. Although Mrs. Golden had an opportunity to review each return, she did not do so, instead relying on the assurances of her husband and their CPA. The Goldens received periodic reports from SHA, which Mrs. Golden found assured her that "everything was good with this limited partnership." J.A. at 256, 260-61 (Trial Tr. at 38, 42-43). In 1981, the IRS contacted the Goldens, notifying them that SHA was being audited and requesting an extension of the statute of limitations applicable to those tax years, which the Goldens granted. The Goldens refused, however, to grant any extension after 1986. Although Mrs. Golden seems to

have deferred to Mr. Golden's judgment, Mr. Golden did consult her before making these decisions.

After an audit, the IRS disallowed the SHA-related losses and credits the Goldens had claimed for the tax years at issue and sent the Goldens a letter on December 9, 1988, proposing increases in the amount of the tax for these years and instructing the Goldens of their right to have a conference with an IRS Appeals Officer. Receiving no response, the IRS sent the Goldens a Notice of Deficiency[1] on June 1, 1990, listing the deficiency for each year and informing the Goldens of their right to file for review in the United States Tax Court within ninety days. Accordingly, the Goldens filed a petition in the Tax Court on August 20, 1990, in part arguing that the deficiency was barred by the three-year statute of limitations on assessment in I.R.C. § 6501.[2] The parties reached a stipulated decision, which was entered by the Tax Court on February 7, 1994, and the IRS assessed the stipulated deficiencies on May 10, 1994.

The Goldens made no payment, and after nine years, on July 28, 2003, the IRS sent the Goldens a letter demanding payment of the deficiencies plus

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[1] Before the IRS may make an assessment of deficient taxes, the IRS must send the taxpayers a notice of the deficiency, and the taxpayers may file a petition in the Tax Court for redetermination of the deficiency. *See* I.R.C. §§ 6212, 6213.

[2] Although the petition from this previous Tax Court case is not part of the record before us, the Goldens have repeatedly admitted that the three-year statute of limitations was asserted in the 1990 action. *See* J.A. at 230 (Trial Tr. at 12); Golden Br. at 17; Reply Br. at 3.

interest and penalties. The IRS sent a Final Notice on August 20, 2003, notifying the Goldens of the IRS's intent to levy under I.R.C. § 6331 and of the Goldens' right to administrative appeal under § 6330.[3] This notice of proposed collection action forms the basis of the case before us.

On September 15, 2003, the Goldens timely filed their request for a Collection Due Process ("CDP") hearing before an IRS Appeals Officer under § 6330, along with a Form 8857, which requested innocent-spouse relief for Mrs. Golden. The Goldens asserted, inter alia, that "[t]he statute of limitations for assessment of tax was not extended to 1994," that the ten-year statute of limitations on collection in I.R.C. § 6502 had expired, and that Mrs. Golden was entitled to innocent-spouse relief. J.A. at 26, 124 (Request for CDP Hearing). The Goldens had a CDP hearing before an IRS Appeals Officer, and the officer issued a Notice of Determination denying relief on August 11, 2004. The officer found that the collection was not time barred, but the discussion focused on the applicability of the ten-year statute of limitations on collection, a challenge that the Goldens have now dropped.[4] The officer also found that neither of the

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[3] Section 6330(a)(1) provides that "[n]o levy may be made on any property or right to property of any person unless the Secretary has notified such person in writing of their right to a hearing under this section before such levy is made." The remainder of the section provides the procedures through which the notice and hearing are to be administered.

[4] The ten-year statute of limitations on collection was again raised before the Tax Court and in the Goldens briefs on appeal to this court. At oral argument, however, the Goldens conceded that the

three types of innocent-spouse relief provided by § 6015 applied to Mrs. Golden.

On September 10, 2004, the Goldens timely filed a petition in the Tax Court for review of the IRS Appeals Officer's determinations. Among other things, the petition alleged that the collection was barred by both the three-year statute of limitations on assessment and the ten-year statute of limitations on collection and that Mrs. Golden was entitled to innocent-spouse relief. The Commissioner answered on November 4, 2004, alleging as "a defense to the interpreted assignment of error that the statute of limitation bars the collection of the tax due" that "the respondent's records reflect that the respondent assessed the petitioners' tax liabilities for [the relevant tax years] on May 10, 1994 after the entry of the stipulated Decision by [the Tax] Court on February 7, 1994 for Docket No. 18777-90." J.A. at 20 (Answer at 7). The stipulated decision was mentioned elsewhere in the answer and attached as an exhibit.

On December 17, 2004, the Commissioner filed a motion for partial summary judgment "on the issues with respect to the application of the statutes of limitations." J.A. at 41 (Mot. for Partial Summ. J. at 1). Regarding the three-year statute of limitations, the Commissioner argued that res judicata and collateral estoppel barred this claim, because the claim could have been presented in the prior Tax Court action. The Goldens then filed an objection to the motion for

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ten-year statute of limitations has not yet run, abandoning this argument. Because the application of § 6502 is no longer before this court, we will not decide this issue.

partial summary judgment, arguing in part that the issue of the three-year statute of limitations was not precluded by collateral esstoppel or res judicata because the issue was never litigated and "the passage of substantial time allows the raising of the statutes of limitation based on new dates and new facts." J.A. at 132-34 (Pet'r Objections at 5-7).

At the hearing on the motion, held on March 15, 2005, Mr. Golden admitted that he "could have raised the three-year statute" during the previous Tax Court proceeding. J.A. at 160 (Summ. J. Hr'g Tr. at 9). After the hearing, the court granted the Goldens' request to file a supplemental brief opposing summary judgment. Although the Goldens's pre-hearing objections had addressed res judicata and collateral estoppel, they now claimed that they "were taken aback by the Court's question because *Res Judicata* was not mentioned in the written motion by the Respondent, nor was it pled as an affirmative defense by the Respondent," and argued that the Commissioner waived these affirmative defenses by not raising them in the pleadings. J.A. at 138 (Pet'r Br. in Supp. of a Denial of Resp't Mot. for Summ. J. at 2).

The Tax Court granted the Commissioner's motion for partial summary judgment, finding "as a matter of law that petitioners are barred from contesting the existence, amounts, and timeliness of the underlying assessments in this case, and that the period of limitations on collection of the assessments here has not expired." J.A. at 174 (T.C. Memo 2005-170 at 11). The court found that the three-year statute-of-limitations argument was precluded both under I.R.C. § 6330(c)(2)(B), which limits the types of claims that may be raised in a CDP hearing, and by

the doctrine of res judicata. In response to the Goldens' claim of surprise as to res judicata, the court "call[ed] petitioners' attention to pages 16 through 20 of respondent's motion." J.A. at 169 (T.C. Memo 2005-170 at 6). The court found that the stipulated judgment was a judgment on the merits and concluded that

> The validity of the notice of deficiency is a matter that could have been raised and litigated in connection with the deficiency proceeding, involving these same petitioners, and the same tax years. Because the decision in that case was not appealed and has since become final, res judicata precludes petitioners from now disputing the amounts of the deficiencies or the timeliness of the statutory notice in this collection action.

J.A. at 171-72 (T.C. Memo 2005-170 at 8-9). The Tax Court's grant of summary judgment disposed of the Goldens' challenge to the collection action itself, leaving only the issue of innocent-spouse relief.

On June 14, 2006, Tax Court held a trial on this remaining issue, at which both Mr. and Mrs. Golden testified. On October 1, 2007, the Tax Court upheld the IRS Appeals Officer's determination that Mrs. Golden was not entitled to innocent-spouse relief under any provision of § 6015. With regard to § 6015(b), the Tax Court agreed that the facts did not meet three of the requirements for relief:

> The erroneous items, the losses from the partnership, are not attributable solely to Golden. Petitioner admits that the investment

> in the partnership was explained to her and that she was aware of her status as a limited partner. She further admits that she received the annual reports from the partnership listing her losses, that Golden truthfully discussed the partnership with her regularly, and that she willingly signed the tax returns for the subject years without reviewing them. As to the latter point, a reasonably prudent person in the position of petitioner, a college-educated individual, would have reviewed each return and at least inquired about the losses reported each year. As this Court has previously stated in similar settings, a spouse cannot escape tax responsibilities by ignoring the contents of a tax return when signing it. Given that petitioner has a college degree, that she had full access to joint bank accounts, that she balanced the couple's checkbook, that she knew of her status as a limited partner in the partnership, and that she failed to discharge her duty of inquiry, petitioner is deemed to have had reason to know of the understatements on the income tax returns for the years at issue.

J.A. at 283-84 (T.C. Memo 2007-299 at 5-6) (citations omitted). On October 29, 2007, the Tax Court issued an order and decision sustaining the IRS Appeals Officer's determinations. The Goldens now timely appeal both this order and the Tax Court's earlier grant of summary judgment to the Commissioner.

II. ANALYSIS

A. Challenge to the Timeliness of the Assessment

We review de novo the Tax Court's grant of summary judgment. *See Living Care Alternatives of Utica, Inc. v. United States*, 411 F.3d 621, 625 (6th Cir. 2005). When reviewing an administrative determination under I.R.C. § 6330(d), the Tax Court reviews de novo decisions about the underlying tax liability and reviews all other decisions for abuse of discretion. *Hoffman v. Comm'r*, 119 T.C. 140, 144-45 (2002). The Commissioner argues that the timeliness of the assessment is not a decision about the underlying tax liability. We need not decide this issue, however, because the Tax Court did not err in granting summary judgment under either standard.

The Tax Court found that the Goldens' challenge to the timeliness of the assessment based on the three-year statute of limitations was precluded for two independent but related reasons. Both of these grounds, the proper scope of a CDP hearing and the doctrine of res judicata, are based on the argument that any challenge to the timeliness of the assessment should have been made, if at all, when the Goldens received statutory notice of deficiency in 1990.

A CDP hearing is a specific administrative procedure, set out in I.R.C. § 6330, through which taxpayers may challenge proposed collection actions brought by the IRS. Taxpayers may raise only certain types of challenges by way of a CDP hearing:

> (A) In general.—The person may raise at the hearing any relevant issue relating to the

unpaid tax or the proposed levy, including—

(i) appropriate spousal defenses;

(ii) challenges to the appropriateness of collection actions; and

(iii) offers of collection alternatives, which may include the posting of a bond, the substitution of other assets, an installment agreement, or an offer-in-compromise.

(B) Underlying liability.—The person may also raise at the hearing challenges to the *existence or amount of the underlying tax liability* for any tax period *if the person did not receive any statutory notice of deficiency* for such tax liability or did not otherwise have an opportunity to dispute such tax liability.

§ 6330(c)(2) (emphasis added). Section 6330 therefore provides an administrative hearing for taxpayers to challenge the IRS's proposed *collection* of taxes, and the Tax Court proceeding was limited to review of that administrative hearing. *See* § 6330(d)(1). Under this statutory scheme, challenges to the underlying tax liability should generally be brought when the taxpayer first receives a notice of deficiency, at which point the taxpayer may petition the Tax Court for redetermination of the deficiency. *See* § 6213(a). Because the Goldens did receive a "statutory notice of deficiency" in 1990 and because prior Tax Court precedent dictated that the timeliness of the

assessment goes to the "underlying tax liability,"[5] the Tax Court found that § 6330(c)(2)(B) precluded the Goldens from raising the statute of limitations on assessment in the CDP hearing.

In addition to the specific proscription in § 6330(c)(2)(B), the Tax Court also relied on the doctrine of res judicata to preclude the Goldens' timeliness challenge. Because the Goldens had an opportunity to raise the timeliness of the assessment in their 1990 challenge to the notice of deficiency, the Tax Court found that the stipulated decision in that case precluded them from raising that claim in this later action. Like § 6330(c)(2)(B), this ground for finding the challenge precluded is based in the idea that the Goldens should have raised the timeliness of the assessment after receiving the notice of deficiency in 1990. While res judicata relies on the fact that the Goldens filed a challenge to the tax that resulted in a final judgment, § 6330(c)(2)(B) would preclude a

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[5] Although several courts have stated that the timeliness of the assessment goes to the underlying tax liability for purposes of § 6330(c)(2)(B), *see, e.g.*, *Kindred v. Comm'r*, 454 F.3d 688, 699 (7th Cir. 2006); *Olender v. Comm'r*, 96 T.C.M. (CCH) 125 (2008), the Commissioner's brief states that the IRS has now taken a contrary position. Because administrative determinations of the underlying tax liability are reviewed by the Tax Court de novo, while other administrative determinations are reviewed for abuse of discretion, the Commissioner argues that issues involving the statute of limitations actually relate to the unpaid tax under § 6330(c)(2)(A), providing for a standard of review more deferential to the IRS's administrative determination. As discussed below, however, we need not decide this question, both because the Goldens have forfeited this issue and because any challenge to the timeliness of the assessment is precluded under the doctrine of res judicata.

challenge to the underlying tax liability regardless of whether the Goldens had actually filed a challenge to the notice of deficiency.

Despite the connection between the two grounds relied upon by the Tax Court, the Goldens' opening brief does not address the Tax Court's finding under § 6330(c)(2)(B). Although the Goldens do mention § 6330(c)(2)(B) in their reply brief, their argument was forfeited when it was not raised in the opening brief. *See Pagan v. Fruchey*, 492 F.3d 766, 769 n.1 (6th Cir. 2007) (en banc). In any event, the Tax Court did not err in finding that the statute-of-limitations argument also was precluded by res judicata.

The Goldens argue that res judicata should not apply because the Commissioner waived the res judicata argument by not raising it in the answer and because the statute-of-limitations challenge could not have been decided in the earlier Tax Court action. Both of these arguments fail.

1. Waiver of Res Judicata

The Goldens' waiver argument is based on Rule 39 of the Tax Court Rules of Practice and Procedure, which provides in part, "A party shall set forth in the party's pleading any matter constituting an avoidance or affirmative defense, including res judicata . . . ." The Goldens argue that Rule 39 precludes the Commissioner's res judicata argument because it was raised by motion rather than in the answer. Although the answer mentions the stipulated decision and the decision is attached as an exhibit to the answer, the Goldens are correct that the answer does not explicitly raise the decision's preclusive effect. We conclude,

however, that the Commissioner effectively raised res judicata in the motion for summary judgment, which was filed shortly after the answer and caused no prejudice to the Goldens.

In the context of Rule 8(c) of the Federal Rules of Civil Procedure, which is substantially similar to Tax Court Rule 39, it is "clearly established that res judicata can also be raised by motion," *Westwood Chem. Co. v. Kulick*, 656 F.2d 1224, 1227 (6th Cir. 1981), particularly where no prejudice is shown, *see Platsis v. E.F. Hutton & Co.*, 946 F.2d 38, 42 (6th Cir. 1991), *cert. denied*, 503 U.S. 984 (1992); *see also Hutcherson v. Lauderdale County, Tenn.*, 326 F.3d 747, 757-58 (6th Cir. 2003) (raising res judicata sua sponte). We see no reason not to apply the same principles to Tax Court Rule 39, particularly when the Tax Court has noted that affirmative defenses may be raised in the pleadings "or by motion." *Likins-Foster Honolulu Corp. v. Comm'r*, 50 T.C.M. (CCH) 1465 (1985); *Jefferson v. Comm'r*, 50 T.C. 963, 966 (1968).

Although the Goldens argue that they "have a right to rely upon the Rules of the Tax Court in presenting their case and in the hearing and determinations of their case," Golden Br. at 20, they have shown no prejudice. Their assertion to the Tax Court that they were unfairly surprised at the hearing was disingenuous, as they had responded to this very argument almost two months prior to the hearing. The motion for partial summary judgment was filed only three months after the petition for review and one and a half months after the answer, leaving the Goldens almost four months to respond before the hearing. Even if that short delay did cause any prejudice, it was cured when the Tax Court allowed

the Goldens to file an additional brief after the hearing. Further, the answer referred to the stipulated decision twice and attached it as an exhibit, giving the Goldens notice that it would be used as a defense. For these reasons, the Tax Court did not err in allowing the Commissioner to raise the affirmative defense of res judicata by motion.

2. Application of Res Judicata

The Tax Court also correctly found that res judicata precluded the Goldens from raising the three-year statute of limitations as a defense to the levy action, because "[t]he validity of the notice of deficiency is a matter that could have been raised and litigated in connection with the deficiency proceeding, involving these same petitioners, and the same tax years." J.A. at 171 (T.C. Memo 2005-170 at 8). Under the doctrine of res judicata, also known as claim preclusion, a party is precluded from bringing a claim when there exists

> (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their 'privies[';] (3) an issue in the subsequent action which was litigated or should have been litigated in the prior action; and (4) an identity of the causes of action.

United States v. Vasilakos, 508 F.3d 401, 406 (6th Cir. 2007) (alteration in original) (quoting *Saylor v. United States*, 315 F.3d 664, 668 (6th Cir. 2003)). In the tax context, "if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is res judicata as to any subsequent proceeding involving the same claim and the same tax year."

Comm'r v. Sunnen, 333 U.S. 591, 598 (1948); *see also Baker v. IRS (In re Baker)*, 74 F.3d 906, 910 (9th Cir.), *cert. denied*, 517 U.S. 1192 (1996).

The Goldens challenged the notice of deficiency in the Tax Court in 1990, and a stipulated decision was entered in that case in 1994. For purposes of res judicata, a stipulated decision "has the full effect of final judgment." *Blakely v. United States*, 276 F.3d 853, 866 (6th Cir. 2002); *see also Baker*, 74 F.3d at 910; *United States v. Shanbaum*, 10 F.3d 305, 313 (5th Cir. 1994); *accord United States v. Int'l Bldg. Co.*, 345 U.S. 502, 506 (1953). It does not matter, as the Goldens argue, that the Tax Court in the 1994 case never actually decided this issue, because res judicata binds the parties "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Sunnen*, 333 U.S. at 597 (quoting *Cromwell v. County of Sac*, 94 U.S. 352, 352 (1876)).

The Goldens argue that they could not have challenged the timeliness of the assessment because it was not made until after the proceeding was concluded, but Mr. Golden conceded at the summary-judgment hearing that they "could have raised the three-year statute" in the 1990 proceeding. J.A. at 160 (Summ. J. Hr'g Tr. at 9). This argument is even more strange given Mr. Golden's testimony at trial that he "raised the issue in the pleadings [in the 1990 proceeding], both the ten year statute for collection and the three year statute for assessment," J.A. at 230 (Trial Tr. at 12), and the admissions in the Goldens' briefs and at oral argument that they did in fact raise this issue in the previous Tax Court

proceeding. Although the assessment had not yet been made, the Goldens had received a notice of deficiency, which served as statutory notice that the taxes would be assessed to their account, *see* I.R.C. § 6213(a), allegedly after the statute of limitations had expired. Upon receiving this notice, they could have, and admittedly did, argue that the three-year statute of limitations on assessment had already run. When the Goldens agreed to a stipulated decision, they settled all claims that were or could have been raised in that case, including the statute of limitations. The Goldens are therefore precluded from asserting these same challenges almost ten years later.

B. Innocent-Spouse Relief

The Tax Court's ruling that Mrs. Golden did not meet the requirements for innocent-spouse relief is a finding of fact reviewed for clear error. *Richardson v. Comm'r*, 509 F.3d 736, 740 (6th Cir. 2007); *Silverman v. Comm'r*, 116 F.3d 172, 173 (6th Cir. 1997). Because the availability of innocent-spouse relief is not a decision about the underlying tax liability, the determination of the IRS Appeals Officer should be upheld by the Tax Court absent an abuse of discretion. *See Living Care*, 411 F.3d at 625-26 & n.5.

The Tax Court did not clearly err in upholding the IRS Appeals Officer's determination that Mrs. Golden was not entitled to innocent-spouse relief. Generally, taxpayers filing joint returns are jointly and severally liable for the tax owed. I.R.C. § 6013(d)(3). Under the innocent-spouse provisions of I.R.C. § 6015, however, one spouse may be relieved of this liability. Although the Tax Court considered and rejected Mrs. Golden's claims to all three distinct types of relief provided for

by § 6015, the Goldens appeal only the decision denying relief under § 6015(b). Section 6015(b) provides for relief from liability if the taxpayer meets five requirements:

> (A) a joint return has been made for a taxable year;
>
> (B) on such return there is an understatement of tax attributable to erroneous items of one individual filing the joint return;
>
> (C) the other individual filing the joint return establishes that in signing the return he or she did not know, and had no reason to know, that there was such understatement;
>
> (D) taking into account all the facts and circumstances, it is inequitable to hold the other individual liable for the deficiency in tax for such taxable year attributable to such understatement; and
>
> (E) the other individual elects (in such form as the Secretary may prescribe) the benefits of this subsection not later than the date which is 2 years after the date the Secretary has begun collection activities with respect to the individual making the election.

§ 6015(b)(1). Accordingly, failure to meet any one of these requirements precludes relief. *Silverman*, 116

F.3d at 173 (interpreting nearly identical predecessor statute, I.R.C. § 6013(e)(1)).

The Tax Court found that Mrs. Golden failed to meet the second, third, and fourth requirements. On appeal, the Goldens contest only the Tax Court's finding with respect to the third requirement. Because the Goldens have failed to contest the Tax Court's findings that relief is precluded by failure to meet the second and fourth elements, each of which is an independent ground for denying relief, and because the Goldens have failed to point to any evidence supporting a conclusion contrary to that of the Tax Court, we affirm the Tax Court's decision without considering the Goldens' argument as to the third requirement.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the Tax Court.

APPENDIX B

UNITED STATES TAX COURT

Docket No. 16694-04L

[Filed October 1, 2007]

ROBERT H. GOLDEN AND JUDITH A. GOLDEN, Petitioners,	)
v.	)
COMMISSIONER OF INTERNAL REVENUE, Respondent*	)

COUNSEL: Robert H. Golden and Judith A. Golden, Pro sese.

Elizabeth R. Proctor and *A. Gary Begun*, for respondent.

SUPPLEMENTAL MEMORANDUM FINDINGS OF FACT AND OPINION

* This opinion supplements our prior Memorandum Opinion, *Golden v. Commissioner*, T.C. Memo. 2005-170.

LARO, *Judge*: This case is a collection case commenced under section 6330(d)(1) relating to petitioners' 1974 and 1977 through 1981 Federal income tax.[1] In *Golden v. Comm'r*, T.C. Memo 2005-170, the Court decided for respondent through partial summary adjudication all issues in this case, but for the correctness of respondent's denial of a section 6015 claim to relief (spousal relief) made by Judith A. Golden (petitioner). We now decide whether respondent abused his discretion in denying petitioner's claim to spousal relief.[2] We hold he did not.

FINDINGS OF FACT

Petitioner and Robert H. Golden (Golden) are married and resided in Southfield, Michigan, when their petition was filed with the Court. Petitioner holds a college degree and worked as an elementary schoolteacher from 1964 to 1969. In 1984, she completed a course in income tax preparation. Golden is a practicing attorney and has practiced law since 1961.

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[1] Unless otherwise noted, section references are to the applicable versions of the Internal Revenue Code, and Rule references are to the Tax Court Rules of Practice and Procedure.

[2] Petitioners invite the Court also to decide an issue as to the proper interest rate applicable in this case. We decline to do so. As just noted, the Court decided in *Golden v. Comm'r*, T.C. Memo 2005-170, that responsible will prevail in this case if the Court holds for respondent as to the spousal relief claim. We also note that petitioners are deemed to have stipulated under Rule 91(f) that the only issue left to be decided is whether petitioner is entitled to spousal relief.

In the mid-1970s, Golden invested in a partnership on behalf of petitioners. Petitioners were each limited partners in the partnership, and they each received annual reports from the partnership accompanied by Schedules K-1, Partner's Share of Income, Deductions, Credits, etc., reporting their shares of partnership losses. Petitioners never realized any income from their investments in the partnership.

Petitioners claimed on their joint Federal income tax returns for the subject years deductions for their distributive shares of losses reported by the partnership. At all relevant times, petitioner knew about her investment in the partnership, and she knew that she was a limited partner. In 1981, respondent notified petitioners that the partnership was under investigation and that losses generated by the partnership might be disallowed. After 1981, petitioners ceased deducting losses from the partnership on their Federal income tax returns.

Respondent disallowed the partnership loss deductions petitioners claimed on their Federal income tax returns for the subject years. The disallowance resulted in the deficiencies in tax for which petitioner seeks spousal relief. Those deficiencies were assessed pursuant to stipulated decisions entered by this Court in a deficiency suit brought by petitioners.

During the subject years, petitioner was responsible for balancing the couple's checkbook, and she had full access to their joint bank accounts. She was not abused physically or mentally by Golden during those years.

OPINION

Spouses filing a joint Federal income tax return are generally jointly and severally liable for tax found to be owning. Sec. 6013(d)(3); *Butler v. Commissioner*, 114 T.C. 276, 282 (2000). However, it is possible for an individual filing a joint return to be relieved of joint and several liability. Section 6015 prescribes three types of relief: (1) Full or apportioned relief under section 6015(b), (2) proportionate relief under section 6015(c), and (3) equitable relief under section 6015(f). Petitioner claims entitlement to one or all of these types of relief. Except as otherwise provided in section 6015, petitioner bears the burden of proving that claim. See *Alt v. Comm'r*, 119 T.C. 306, 311 (2002), affd. 101 Fed. Appx. 34 (6th Cir. 2004); see also Rule 142(a)(1).

To qualify for relief under section 6015(b), a requesting spouse needs to satisfy the requirements of section 6015(b)(1). Under section 6015(b)(1), relief may be granted under section 6015(b) if the following requirements are met: (1) A joint return has been made for the taxable year, (2) on such return there is an understatement of tax attributable to erroneous items of one individual filing the joint tax return, (3) the spouse seeking relief establishes that in signing the return he or she did not know, nor have reason to know, that there was an understatement of tax, and (4) taking into account all of the facts and circumstances, it is inequitable to hold the requesting spouse liable for the deficiency in tax for the taxable year attributable to the understatement. The requesting spouse's failure to meet any one of these requirements prevents him or her from qualifying for

full or apportioned relief under section 6015(b). *Alt v. Comm'r*, *supra* at 313.

Petitioner does not meet the second, third, or fourth requirement for full or apportioned relief under section 6015(b). The erroneous items, the losses from the partnership, are not attributable solely to Golden. Petitioner admits that the investment in the partnership was explained to her and that she was aware of her status as a limited partner. She further admits that she received the annual reports from the partnership listing her losses, that Golden truthfully discussed the partnership with her regularly, and that she willingly signed the tax returns for the subject years without reviewing them. As to the latter point, a reasonably prudent person in the position of petitioner, a college-educated individual, would have reviewed each return and at least inquired about the losses reported each year. As this Court has previously stated in similar settings, a spouse cannot escape tax responsibilities by ignoring the contents of a tax return when signing it. See *Mora v. Comm'r*, 117 T.C. 279, 289 (2001); *Albin v. Comm'r*, T.C. Memo 2004-230; see also *Levin v. Commissioner*, T.C. Memo 1987-7. Given that petitioner has a college degree, that she had full access to joint bank accounts, that she balanced the couple's checkbook, that she knew of her status as a limited partner in the partnership, and that she failed to discharge her duty of inquiry, petitioner is deemed to have had reason to know of the understatements on the income tax returns for the years at issue.[3] We

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[3] As to the fourth requirement of sec. 6015(b), petitioner has not presented any evidence that it would be inequitable to hold her liable for the deficiencies for the subject years.

conclude that petitioner does not qualify for relief under section 6015(b).

Section 6015(c) allows a qualifying individual to receive proportionate relief from joint and several liability for a deficiency if, in addition to meeting other conditions, upon electing relief under section 6015(c), the individual is divorced or legally separated from the other spouse or has lived apart from the other spouse for the past 12 months. Petitioner fails to meet this requirement. She is still married to and living with Golden. We conclude that petitioner does not qualify for relief under section 6015(c).

Because we hold that petitioner is not entitled to either full or proportionate relief under subsection (b) or (c) of section 6015, we now consider whether she is entitled to equitable relief. Under section 6015(f), the Commissioner may grant equitable relief to an individual if relief is not available to the individual under section 6015(b) or (c) and it would be inequitable to hold the individual liable for the tax liability.[4] Petitioner bears the burden of proving that respondent's denial of her claim was an abuse of respondent's discretion. See *Washington v. Comm'r*, 120 T.C. 137, 146 (2003); *Cheshire v. Commissioner*,

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[4] This Court has held that our determinations of whether a taxpayer is entitled to relief under sec. 6015(f) "is made in a trial de novo and it not limited to matter contained in respondent's administrative record". See *Ewing v. Comm'r*, 122 T.C. 32, 44 (2004), vacated 439 F.3d 1009 (9th Cir. 2006). That decision was vacated for lack of jurisdiction. We need not and do not decide here whether our review of respondent's denial of relief under sec. 6015(f) is limited to the administrative record because our holding would remain the same in any event.

115 T.C. 183, 198 (2000). In order to prevail, petitioner must demonstrate that respondent exercised his discretion arbitrarily, capriciously, or without sound basis in fact or law when he denied her the equitable relief. See *Jonson v. Comm'r*, 118 T.C. 106, 125 (2002), affd. 353 F.3d 1181 (10th Cir. 2003).

Before the Commissioner will consider a taxpayer's request for relief under section 6015(f), the taxpayer must satisfy all seven threshold conditions listed in Rev. Proc. 2003-61, sec. 4.01, 2003-2 C.B. 296, 297.[5] These conditions are as follows: (1) The requesting spouse filed a joint return for the taxable year for which he or she seeks relief, (2) relief is not available to the requesting spouse under section 6015(b) or (c), (3) the requesting spouse applies for relief no later than 2 years after the date of the Commissioner's first collection activity after July 22, 1998, with respect to the requesting spouse, (4) no assets were transferred between the spouses as part of a fraudulent scheme by the spouses, (5) the nonrequesting spouse did not transfer disqualified assets to the requesting spouse, (6) the requesting spouse did not file or fail to file the return with fraudulent intent, and (7) the income tax liability from which the requesting spouse seeks relief is attributable to an item of the individual with whom the requesting spouse filed the joint return. Petitioner fails to satisfy the last condition; i.e., that the income tax liability from which the requesting spouse seeks

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[5] Although the deficiencies in tax arose in years before the revenue procedure's effective date of Nov. 1, 2003, this revenue procedure is applicable to petitioner's case as her request for relief was made after Nov. 1, 2003.

relief be attributable to an item of the individual with whom the requesting spouse filed the joint return.

Petitioners were both limited partners in the partnership, and petitioner was aware of this fact. Thus, the item giving rise to the losses, petitioner's investment in the partnership, is not attributable to Golden alone. Rather, that item is attributable to both of them. We conclude that petitioner does not qualify for relief under section 6015(f). See *Schwendeman v. Comm'r*, T.C. Memo 2007-227.

We have considered all petitioners' arguments for holdings contrary to those expressed herein and reject those arguments not discussed herein as irrelevant or without merit.

Decision will be entered for respondent.

APPENDIX C

UNITED STATES TAX COURT

Docket No. 16694-04L

[Filed October 29, 2007]

ROBERT H. AND JUDITH A. GOLDEN, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

ORDER AND DECISION

On August 11, 2004, petitioners petitioned the Court under sections 6320 and 6330, I.R.C., to review the Commissioner's determination as set forth in the Notice of Determination Concerning Collection Actions(s). On October 1, 2007, the Court filed a Memorandum Opinion (T.C. Memo. 2007-299). Upon due consideration, it is

ORDERED AND DECIDED that the determination set forth in the Notice of Determination Concerning Collection Action(s) Under Section 6330 upon which this case is based is sustained.

(Signed) David Laro
David Laro
Judge

ENTERED: OCT 29 2007

APPENDIX D

UNITED STATES TAX COURT

Docket No. 16694-04L

[Filed July 11, 2005]

ROBERT H. GOLDEN and JUDITH A. GOLDEN, Petitioners	)
v.	)
COMMISSIONER OF INTERNAL REVENUE, Respondent	)

COUNSEL: Robert H. Golden and Judith A. Golden, pro sese.

A. Gary Begun, for respondent.

MEMORANDUM OPINION

DEAN, *Special Trial Judge*: This case is before the Court on respondent's motion for partial summary judgment filed pursuant to Rule 121. All Rule references are to the Tax Court Rules of Practice and Procedure. All section references are to the Internal Revenue Code of 1986, as amended.

The motion arises in the context of a petition filed in response to a notice of determination concerning collection action under section 6330 sent to petitioners and a notice of determination concerning relief from joint liability under section 6015 sent to Ms. Golden. Respondent moves for partial summary judgment with respect to collection issues other than Ms. Golden's request for spousal relief. The section 6015 claim will be dealt with separately at a later date.

Background

Origin of the Tax Liabilities

As alleged in the petition in this case, in 1976 and 1977, Robert H. Golden (petitioner) invested $ 29,000 in a partnership in which he had no management duties and with which he had minimal contact. Petitioners claimed tax losses on their joint Federal income tax returns for the years 1974 through 1981 using information sent to them in yearly Schedules K-1, Partner's Share of Income Deductions, Credits, etc.

Further, according to the petition, during 1981 petitioners were advised by the Internal Revenue Service (IRS) that the partnership was under investigation and that losses generated by the partnership might be disallowed. The petition alleges that for several years petitioners agreed to extend the period of limitations while IRS investigated the partnership.

Attached to respondent's motion for partial summary judgment is a partial copy of a statutory notice of deficiency dated June 1, 1990, issued to petitioners for the following years and amounts:

Year	Deficiency
1974	$ 1,551.00
1977	16,718.00
1978	5,567.00
1979	6,706.30
1980	4,166.00
1981	3,994.00

Also attached to respondent's motion is a copy of a stipulated decision of this Court, entered February 7, 1994, in the case of Robert H. Golden and Judith A. Golden, docket No. 18777-90, ordering and deciding that there are deficiencies in income taxes due from petitioners as follows:

Year	Deficiency
1974	$ 1,551.00
1977	2,218.00
1978	5,567.00
1979	6,706.30
1980	4,166.00
1981	3,994.00

Evidence of the Assessments

Certified copies of Forms 4340, Certificate of Assessments, Payments, and Other Specified Matters, attached as exhibits to respondent's motion, show that the above-stipulated deficiencies were assessed by the IRS on May 10, 1994. Petitioners were subsequently notified of their outstanding tax liabilities by letter, and on August 20, 2003, were issued a notice of intent to levy and advised of their right to a hearing. On

September 16, 2003, respondent received a Form 12153, Request For A Collection Due Process Hearing, dated by petitioners as September 15, 2003.

Petitioners' Allegations of Error

In their petition, petitioners allege a number of "Counts", which in essence raise three issues: (1) That the expiration of the period of limitations on assessment, and the expiration of the period of limitations for collections each bar respondent from collecting liabilities for the years at issue; (2) that the partnership investments that generated the liabilities were not tax-motivated transactions warranting increased interest, and (3) that Judith A. Golden is entitled to section 6015 relief. Respondent's motion is directed only to the first two issues.

Discussion

Respondent requests in the motion that the Court determine, as a matter of law, that petitioners cannot contest the expiration of the period of limitations on assessment, and that as a matter of law, the period of limitations on collection of the tax liabilities at issue here has not expired.

Standard for Granting Summary Judgment

The standard for granting a motion for summary judgment under Rule 121 is stated in the rule itself.

> A decision shall * * * be rendered if the pleadings, answers to interrogatories, depositions, admissions, and any other acceptable materials, together with the

> affidavits, if any, show that there is no genuine issue as to any material fact and that a decision may be rendered as a matter of law. * * * [Rule 121(b).]

Rule 121(d) provides that, when a properly supported motion for summary judgment is made, the adverse party "must set forth specific facts showing that there is a genuine issue for trial."

Respondent poses two legal bases upon which to rest a favorable ruling on his motion for partial summary judgment. Respondent argues that as a matter of law, petitioners' argument concerning the period of limitations on assessment and the nature of their partnership investments, potential issues in the prior Tax Court litigation, are precluded from litigation in this case due to statutory and caselaw principles. Respondent also argues that he has shown that there remains no material issue of fact with respect to whether the period of limitations on collection has expired. The Court agrees with respondent on both issues.

Timely Notice of Deficiency

Section 6330 Review

Taxpayers may present at a section 6330 hearing challenges to the existence or amount of the underlying tax liability "if the person did not receive any statutory notice of deficiency for such liability". Sec. 6330(c)(2)(B).

Petitioners' claims as to whether the statutory notice of deficiency was issued within the period of

limitations constitute challenges to the underlying tax liabilities. *Hoffman v. Comm'r*, 119 T.C. 140, 145 (2002); *Rodriguez v. Comm'r*, T.C. Memo 2003-153; *MacElvain v. Comm'r*, T.C. Memo 2000-320.

That petitioners received and contested a notice of deficiency for 1974, 1977, 1978, 1979, 1980, and 1981, resulting in the entry of a stipulated decision that there are deficiencies in their income taxes for those years, is not in dispute. Petitioners are therefore precluded by section 6330(d)(2)(B) from challenging the amounts of the deficiencies or the timeliness of the statutory notice as a matter of law.

Res Judicata

Petitioners are precluded not only by operation of section 6330(c)(2)(B) from raising the issue of the period of limitations on assessment; they are so precluded by the doctrine of res judicata. At the hearing on respondent's motion, the Court questioned petitioner, a practicing attorney, as to the application of the doctrine of res judicata to this case. In petitioners' brief in opposition to respondent's motion, petitioners assert that the questioning by the Court was a surprise because "Res Judicata was not mentioned in the written motion by the Respondent". The Court calls petitioners' attention to pages 16 through 20 of respondent's motion. There, respondent argues that due to the application of the doctrine of res judicata petitioners are precluded from questioning here the validity of the notice of deficiency that were the subject of the prior litigation.

The Supreme Court in *Comm'r v. Sunnen*, 333 U.S. 591, 597, 92 L. Ed. 898, 68 S. Ct. 715 (1948),

summarized the judicial doctrine of res judicata, also known as claim preclusion, as follows:

> The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' *Cromwell v. County of Sac*, 94 U.S. 351, 352, 24 L. Ed. 195. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. * * *

As to the application of the doctrine in the context of tax litigation the Court stated:

> Income taxes are levied on an annual basis. Each year is the origin of a new liability and of a separate cause of action. Thus if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is res judicata as to any subsequent proceeding involving the same claim and the same tax year. * * * [*Id.* at 598.]

As a general rule, where the Tax Court has entered a decision for a taxable year, both the taxpayer and the Commissioner (with certain exceptions) are barred from reopening that year. *Hemmings v. Commissioner*, 104 T.C. 221, 233 (1995). It has also been held that

"the Tax Court's jurisdiction, once it attaches, extends to the entire subject of the correct tax for the particular year." *Erickson v. United States*, 159 Ct. Cl. 202, 309 F.2d 760, 767 (1962).

An agreed or stipulated judgment is a judgment on the merits for purposes of res judicata. *In re Baker*, 74 F.3d 906, 910 (9th Cir. 1996); see also *United States v. Intl. Bldg. Co.*, 345 U.S. 502, 503-506, 97 L. Ed. 1182, 73 S. Ct. 807, 1953-1 C.B. 529 (1953) (recognizing res judicata effect of stipulated Tax Court decisions); accord *Erickson v. United States, supra* at 768; *Krueger v. Commissioner*, 48 T.C. 824, 828-829 (1967).

Respondent issued to petitioners a notice of deficiency with respect to the subject taxable years, petitioners petitioned for redetermination, and the case was concluded without trial by entry of a stipulated decision on February 7, 1994. Here, petitioners would like to argue that the statutory notice of deficiency was issued outside the period of limitations for the years involved. Petitioners could have made this challenge in their pleadings in the earlier Tax Court proceeding as an affirmative defense under Rule 39, Pleading Special Matters.

The validity of the notice of deficiency is a matter that could have been raised and litigated in connection with the deficiency proceeding, involving these same petitioners, and the same tax years. Because the decision in that case was not appealed and has since become final, res judicata precludes petitioners from now disputing the amounts of the deficiencies or the timeliness of the statutory notice in this collection action. See *Newstat v. Comm'r*, T.C. Memo 2004-208.

Period of Limitations on Collection

Petitioners argue that even if the period of limitations on assessment had not expired when the notice was issued, or the issue is precluded from dispute here, respondent's proposed collection action is outside the period of limitations on collection.

Section 6502, Collection After Assessment, provides that where an assessment has been timely made, the tax may be collected by levy or proceeding that is begun "within 10 years after the assessment of the tax". The Forms 4340 show that the stipulated deficiencies entered by the Court's decision of February 7, 1994, were assessed by the IRS 92 days later, on May 10, 1994. After a notice of deficiency is mailed, the running of the period of limitations on assessment is suspended until the decision of the Tax Court becomes final, after 90 days without an appeal, and for 60 days thereafter. Sec. 6503; see also secs. 7481, 7483.[1]

On August 20, 2003, respondent issued a notice of intent to levy and right to a hearing for the tax years at issue. On September 16, 2003, respondent received petitioners' request for a hearing under section 6330. The date petitioners mailed their request for a hearing under section 6330 was less than 10 years from the date of the assessments. Once the request for hearing was made, the running of the period of limitations on

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[1] Although not specifically framed by petitioners, their general argument that "the statute of limitations on assessment had run" could subsume the argument that the assessments after entry of decision were untimely. As can be seen from the pertinent dates, the assessments were in fact timely made.

collection was suspended and remains suspended until the 90th day after the day on which there is a final determination in this case. Sec. 6330(e)(1); *Boyd v. Comm'r*, 117 T.C. 127, 130-131 (2001); sec. 301.6330-1(g), Proced. & Admin. Regs.

Petitioners argue that there "must have been" earlier assessments for the years at issue. There "must have been" earlier assessments because there was an assessment in 1987 for a year not at issue, 1976,[2] that was "from the same source", the partnership, according to petitioners. Indeed, petitioners sought formal discovery from respondent of any documents that would show assessments for the years at issue other than those made after the Court's entry of decision. Respondent denied the existence of any such assessments, offering Forms 4340 as proof. Petitioners have provided no evidence that any assessments of tax for the years at issue ever took place prior to May 10, 1994.

Respondent, after adequate time for discovery, has made a showing from the record of a complete failure of proof concerning an essential element of petitioners' claim, and on which petitioners would bear the burden of proof at trial. Rule 142(a); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). There can be no genuine issue as to any material fact with respect to petitioners' claim that the period of limitations for collection has expired.

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[2] In petitioners' brief in opposition to respondent's motion and at oral argument on the motion, petitioners identify the year as 1977 but a Copy of Form 668, Certificate of Release of Federal Tax Lien, attached to petitioners' brief, refers to "Tax Period Ending" Dec. 31, 1976.

Because petitioners have failed to set forth specific facts showing that there is a genuine issue for trial as to the expiration of the period of limitations on collection, respondent is entitled to a summary disposition in his favor. Rule 121(d).

Conclusion

The Court finds as a matter of law that petitioners are barred from contesting the existence, amounts, and timeliness of the underlying assessments in this case, and that the period of limitations on collection of the assessments here has not expired.

An appropriate order will be issued granting respondent's motion for partial summary judgment.

APPENDIX E

UNITED STATES TAX COURT

Docket No. 16694-04L

[Filed July 13, 2005]

ROBERT H. GOLDEN AND JUDITH A. GOLDEN, Petitioners,	)
v.	)
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)

ORDER

On December 20, 2004, the Court filed respondent's Motion for Partial Summary Judgment. On March 15, 2005, the Court took respondent's motion under consideration. Pursuant to the determination of the Court, it is

ORDERED: That consistent with the Court's opinion as set forth in T.C. Memo. 2005-170, filed July 11, 2005, respondent's motion for partial summary judgment is granted. It is further

ORDERED: That this case is restored to the general docket.

(Signed) John F. Dean
John F. Dean
Special Trial Judge

Dated: Washington, DC
July 13, 2005